

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35416

MARK ANDREW COBURN,	)	2010 Unpublished Opinion No. 405
	)	
Petitioner-Appellant,	)	Filed: March 30, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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MELANSON, Judge

Mark Andrew Coburn appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

Coburn was convicted and sentenced in 1989 on a charge of sexual abuse of a child under the age of sixteen. In 2008, Coburn filed an application for post-conviction relief alleging various errors surrounding the psychosexual evaluations prepared for sentencing. Coburn also requested the appointment of counsel. The district court denied Coburn's request for the appointment of counsel because his application was clearly time barred and, therefore, was also frivolous. Coburn argued that *Estrada*<sup>1</sup> announced a new rule that should be applied retroactively in his case making his application timely. The district court granted the state's motion for summary dismissal of Coburn's application because it was barred by the one-year statute of limitation. Coburn appeals.

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<sup>1</sup> *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007).

Our review of the district court's construction and application of the limitation statute is a matter of free review. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman*, 122 Idaho at 628, 836 P.2d at 1089. The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

In this case, Coburn filed his application for post-conviction relief nearly nineteen years after his judgment of conviction became final. Therefore, his application is clearly untimely. However, Coburn argues that his application should be deemed timely because the Idaho Supreme Court announced a new rule of law in *Estrada* that should be applied retroactively. Coburn acknowledges that the Idaho Supreme Court has provided, by way of dicta, that *Estrada* did not announce a new rule of law to be given retroactive application. *See Vavold v. State*, 148 Idaho 44, 46, 218 P.3d 388, 390 (2009). Coburn also acknowledges that this Court has held that *Estrada* did not announce a new rule of law to be given retroactive application. *See Kriebel v. State*, 148 Idaho 188, 191, 219 P.3d 1204, 1207 (Ct. App. 2009). Nonetheless, Coburn argues that *Estrada* should be applied retroactively in his case because there is no controlling Idaho Supreme Court precedent on the issue. However, this Court's holding in *Kriebel* is controlling precedent in the absence of any Idaho Supreme Court holding to the contrary. Coburn makes a lengthy argument as to why *Estrada* announced a new rule of law and why it should be applied retroactively. We need not further address this issue, as we have already done so.

Coburn also argues that the district court erred by denying his request for the appointment of counsel because he raised the *possibility* of a valid claim. Coburn's application was clearly untimely and controlling case law provided that he had no valid argument to toll the statute of limitation. Therefore, Coburn did not raise the possibility of a valid claim and the district court did not err by denying his request for the appointment of counsel. Coburn argues that the statute of limitation should be tolled. However, the only basis he provides to equitably toll the statute of limitation is the retroactive application of *Estrada*. This argument is without merit.

Accordingly, the district court's order summarily dismissing Coburn's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**